



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 3, 2004

Mr. James L. Hall
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2004-7564

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 208537.

The Texas Department of Criminal Justice (the "department") received a request for copies of the (1) legal assistant specialist manual and (2) legal assistant training manual. You assert that some of the requested information does not exist.¹ You also assert that some of the information in the submitted manual is not subject to the Act; alternatively, you claim that the manual is excepted from disclosure under sections 552.101, 552.108, 552.111, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted manual. We have also considered comments submitted by the requestor. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you assert that portions of the submitted manual are not subject to the Act. In Open Records Decision No. 581, this office determined that certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of

¹We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.-San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

public property is not the kind of information made public under section 552.021 of the Government Code. You assert that the manual "essentially describes how to get information out of [the department's] computer systems." However, after careful review of your arguments and the submitted information, we conclude the manual does not contain computer information that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property. Accordingly, the manual is subject to the Act and, therefore, we will address your arguments for exception under the Act.

You assert that the manual is excepted from release under section 552.108 of the Government Code. Section 552.108(b)(1) of the Government Code excepts from public disclosure an internal record of a law enforcement agency that is maintained for internal use in matters relating to law enforcement or prosecution if "release of the internal record or notation would interfere with law enforcement or prosecution." Generally, a governmental body claiming section 552.108(b)(1) must reasonably explain how and why release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(b)(1), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

This office has on numerous occasions concluded that section 552.108 excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.,* Open Records Decision Nos. 531 (1989) (holding that predecessor to section 552.108 excepts detailed guidelines regarding police department's use of force policy), 508 (1988) (holding that release of dates of prison transfer could impair security), 413 (1984) (holding that predecessor to section 552.108 excepts sketch showing security measures for execution). However, release of routine investigative procedures, techniques that are commonly known, and routine personnel information does not interfere with law enforcement and crime prevention. *See* Open Records Decision Nos. 216 at 4 (1978), 133 at 3 (1976).

You assert that, if the manual were released, "a member of the public would have a roadmap that describes how to initiate a change in an offender's time status" and a "computer hacker with this information would have exact directions on how to manipulate the Department's Mainframe computer [and] to alter information about TDCJ offenders." Based on these representations and our review of the submitted information, we conclude you have established that release of a portion of this information, which we have marked, would interfere with law enforcement or prosecution and is therefore excepted from release pursuant to section 552.108.² *See* Gov't Code §552.108(b)(1).

You also assert that the remaining information in the manual is excepted from release under section 552.111. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the

²Because we are able to resolve this under section 552.108, we do not address your other arguments for exception regarding this information.

agency.” This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as the following:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. Tex. R. Civ. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat’l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

You explain that the manual is used strictly as “an in-house guide for legal assistants . . . to review a TDCJ offender-client’s records to determine whether that client is due additional sentence time credit” and that, if the sentencing court or department’s record office miscalculates an offender’s sentence time credit, the inmate may file a writ of habeas corpus to acquire additional time. You argue that “the motivating purpose underlying the creation of the Manual was to file litigation when necessary to obtain additional time on behalf of the offender-client.” However, after careful review of your arguments and the submitted information, we conclude you have not established that the remaining information in the manual was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative; therefore, this information is not excepted under section 552.111.

To conclude, the marked information subject to section 552.108 of the Government Code is excepted from disclosure. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

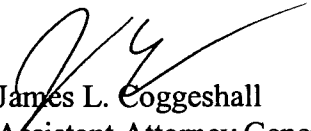
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 208537

Enc. Submitted documents

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(w/o enclosures)